Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Amendment of the Commission's Cellular-PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

To: The Commission

COMMENTS

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Dated: July 7, 1995

SUMMARY

The Commission is correct to retain its Tribal Affiliation Rule in the wake of the Supreme Court's decision in Adarand Constructors, Inc. v. Pena. As the Commission noted, the Tribal Affiliation Rule is not based on race and is not affected by Adarand. Instead, the Rule is based on the unique relationship between the federal government and Native American entities. Such regulations do not implicate racial classifications and are not subject to traditional equal protection analysis. The Tribal Affiliation Rule also does not prefer Tribal entities over other, similarly-situated groups.

Moreover, the Tribal Affiliation Rule is an essential and integral component of federal policy toward Native American entities. The Tribal Affiliation Rule is based on the sound policy determination that the assets of Tribes and Alaska Native Corporations are severely and uniquely restricted by federal law. As the record in this proceeding demonstrates, Alaska Native Corporations are forced aggregations of predominantly poor Native Americans. The core purpose of both Native Corporations and Tribes is to provide for the welfare of their members. The Tribal Affiliation Rule embodies the recognition by Congress that the assets and resources of these Native Corporations and Tribes may not be devoted to traditional commercial undertakings in the same manner available to typical private corporations.

Finally, the record before the Commission does not support departure from of the Tribal Affiliation Rule. The Commission would be required to supply a reasoned analysis for rescinding

the Tribal Affiliation Rule in the wake of the Adarand decision after notice of a proposed rescission and the opportunity for public comment to develop a record. No such record could be established, however. The Tribal Affiliation Rule is not linked to the race-based preferences the Commission proposes to withdraw and the essential circumstances justifying the Rule have not changed. For these reasons, the Commission is correct to maintain its Tribal Affiliation Rule.

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COMMENTS

Cook Inlet Region, Inc. ("CIRI"), by its attorneys, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the above-captioned Further Notice of Proposed Rule Making ("Further NPRM") adopted and released by the Commission on June 23, 1995.[1]

I. INTRODUCTION

CIRI is an Alaska Native corporation owned by approximately 6,700 Athabascan, Eskimo, Aleut, Haida, Tlingit, and other Native American shareholders. A majority of CIRI's shareholders are women. CIRI was created and organized pursuant to congressional enactment, as part of the United States' political settlement of Alaska Native claims for the return of their aboriginal lands. See Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-29e ("ANCSA"). CIRI submits these comments in support of the

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1. 60 Fed. Reg. 34,200 (1995).

Commission's modification of its C Block PCS auction, and in support of the Commission's retention of the Commission's Tribal Affiliation Rule, pursuant to which affiliates of Native Corporations and other tribal entities have properly and lawfully been designated "small businesses."

CIRI agrees with the Commission that continuing with race and gender based preferences drafted prior to the Supreme Court's decision in Adarand Constructors, Inc. v. Pena[2] would jeopardize the economic viability of the entire C Block auction to the detriment of the very disadvantaged groups for which the Block was designed.[3] The proposed entrepreneurs' block rules featuring only small business preferences will permit many of the same minority and women-owned businesses to participate in the upcoming auction without raising constitutional concerns.

CIRI also supports the Commission's decision to retain the Tribal Affiliation Rules previously adopted in two separate orders.[4] The Adarand decision neither requires nor justifies an

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2. 63 U.S.L.W. 4523 (U.S. June 12, 1995).

3. CIRI does not, of course, concede that the all forms of minority bidding credits and similar preferences have been rendered unlawful by Adarand. Adarand confirmed that explicitly race-based preferences may be justified to eradicate the effects of discrimination and held simply that such racial preferences are subject to strict judicial scrutiny. CIRI continues to believe that these or similar minority preferences are essential to the creation of equality of opportunity for historically disadvantaged groups.

4. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4493-94 (1994) ("Order on Reconsideration"); Implementation of Section 309(j) of the

end to the Commission's congressionally-mandated goal of ensuring the involvement of "small businesses" in spectrum-based services. Similarly, the decision provides no basis for frustrating express congressional policy treating tribal affiliated entities as "small businesses." This congressional policy is founded on Congress' express constitutional authority over the Indian Nations and is not based on race. It is, therefore, untouched by Adarand.

Moreover, the record before the Commission demonstrates that the Tribal Affiliation Rule is particularly well-suited here, given the Commission's purpose in adopting attribution rules: to determine the relative ability of potential bidders to bring assets to bear on their broadband PCS investment. Native Corporations and Tribes are forced aggregations of predominantly poor Native Americans, who are compelled by law to retain their aboriginal holdings in communal form and who depend on their Native Corporation's distributions for essential food, clothing and shelter. As Congress and the Commission have found, long-standing limitations on tribal ownership and assets render these entities incapable of raising capital or using their existing capital in ways freely available to traditional private corporations.

Nothing in the record supports a departure from clear congressional policy in this area or from the Commission's

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Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 427-29 (1994) ("Fifth Memorandum Opinion and Order").

previous adoption of the Rule. The Commission has no historical experience in Native American affairs generally, or in assessing the size or economic power of tribal entities. In such circumstances, the Commission is obligated to respect express, pre-existing federal policy requiring the Tribal Affiliation Rule.

Changes applicable to race-based preferences have not rendered the Tribal Affiliation Rule inequitable. The Rule does not exclude anyone from participating in the auction. The rule does not discriminate against anyone, because there are no other similarly situated entities. Elimination of the Tribal Affiliation rule would preclude the participation of American Natives simply because they are forced by law to aggregate their extremely limited assets in communal form. Such a result would treat American Natives unfairly, illegally and unconstitutionally.

II. THE COMMISSION IS CORRECT THAT THE TRIBAL AFFILIATION RULE IS A LAWFUL AND NECESSARY COMPONENT OF ITS PROGRAM FOR SMALL BUSINESSES

A. The Tribal Affiliation Rule Is Not Based on Race, Is Not a Preference and Is Not Affected By Adarand

CIRI agrees with the Commission's conclusion that the Tribal Affiliation Rule is not affected by Adarand.[5] Regulations directed at Tribal entities are grounded in the unique, sovereign-to-sovereign relationship between the federal government and Indian Tribes. Such regulations do not implicate

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[5] Further NPRM at ¶ 20.

racial classifications and are not subject to traditional equal protection analysis. Moreover, the Tribal Affiliation Rule does not prefer Tribal entities over other, similarly-situated groups.

1. Regulations Directed At Tribal Entities Are Not "Race-Based" and Are Not Subject to "Strict Scrutiny" Under the Equal Protection Clause

The Indian Commerce Clause of the United States Constitution provides Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[6] This separate, enumerated constitutional power has long been recognized to provide Congress "plenary" authority to deal with Native Americans in unique ways.[7]

Nothing in Adarand even suggested a limitation on Congress' long-standing power over tribal entities. Indeed, as the Commission noted in the Further NPRM, two days after Adarand was decided, the Supreme Court unanimously reaffirmed one of the many special rules applicable to Indian Tribes and their members and not applicable to "non-Indians."[8]

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6. U.S. Const. art. I, § 8, cl. 3. The provision applies with equal force to Alaska Natives. See United States v. Native Village of Unalakleet, 411 F.2d 1255 (Ct. Cl. 1969); Treaty Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, art. 3, 15 Stat. 539, 542. See also Felix S. Cohen, Handbook of Federal Indian Law 734-64 (1982 ed.).

7. See, e.g., Morton v. Mancari, 417 U.S. 535, 551-52 (1974) ("[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself").

8. See Oklahoma Tax Comm'n v. Chickasaw Nation, 63 U.S.L.W. 4594, 4596 (U.S. June 14, 1995).

The enabling constitutional provisions themselves make clear that federal regulation of Indian tribes "is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'"[9] Thus, under long settled law, "Indian tribes are 'domestic dependent nations,'" entitled to unique treatment[10] and subject to federal restraints and regulations which would be unthinkable in any other context.[11] As Chief Justice Burger wrote for a unanimous Supreme Court:

> [t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with the Indians.[12]

Similarly, Justice Scalia, then writing for the United States Court of Appeals for the District of Columbia Circuit, acknowledged that "the Constitution itself . . . 'singles Indians out as a proper subject for separate legislation,'" providing the constitutional basis for "rejecting equal protection challenges"

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9. United States v. Antelope, 430 U.S. 641, 646 (1977) (quoting Morton, 417 U.S. at 553 n.24) (emphasis added).

10. Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

11. See, e.g., Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (affirming Secretary of Interior's regulation of Alaskan village membership).

12. Antelope, 430 U.S. at 645 (footnote omitted) (emphasis added).

to such legislation.[13] Political settlements relating to Tribes have been an essential and lawful part of the formation and expansion of the Nation.[14]

As the Court in Adarand carefully and repeatedly pointed out, equal protection requires strict scrutiny only for preferential treatment based on race.[15] Under settled law, regulations specifically aimed at Native Corporations and Indian tribes are not based on race and are not subject to "[t]raditional equal protection analysis," regardless of the standard of review.[16]

Indeed, Congress has long used its special constitutional powers regarding Indians "to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal

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13. United States v. Cohen, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc).

14. See, e.g., Treaty Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, art. 3, 15 Stat. 539, 542.

15. Even within the category of "race," Justice O'Connor's opinion in Adarand made clear that the Court was articulating only a "general rule" that did not affect certain political powers of government, such as the enumerated federal power over immigration. Adarand, 63 U.S.L.W at 4527-28 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100, 101-02 n.21 (1976)). Further, Justice Stevens noted in his dissent that the Supreme Court has long recognized that Congress' special treatment of Native Corporations and Indian tribes is not based on race, but on their political status as quasi-sovereign entities. See Adarand, 63 U.S.L.W. at 4535 n.3 (Stevens, J., dissenting). The Adarand majority did not question this long established proposition.

16. United States v. Decker, 600 F.2d 733, 740 (9th Cir. 1979). See also Antelope, 430 U.S. at 646-47; Morton, 417 U.S. at 553.

self-sufficiency and economic development.'"[17] Accordingly, even express employment preferences for individual Indians have been affirmed unanimously by the Supreme Court on the ground that the preference was not for a "discrete racial group," but for "quasi-sovereign tribal entities."[18] Such legislation reflects "the unique legal relationship between the Federal Government and tribal Indians."[19] Indeed, far from violating equal protection, regulatory recognition of the special place accorded the Indian tribes was required by "the solemn commitment of the Government toward the Indians."[20]

The separate constitutional basis for the special treatment of Indian Tribes and Alaska Native Corporations remains beyond serious challenge. The formation of tribal entities and the inseparable burdens and benefits applicable only to them are based not on race, but on a political resolution of issues uniquely consigned to Congress by the Constitution.[21]

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17. Potawatomi Indian Tribe, 498 U.S. at 510.

18. Morton, 417 U.S. at 554.

19. Id. at 550.

20. Id.

21. "That Indian are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." Duro v. Reina, 495 U.S. 676, 692 (1990).

2. The Tribal Affiliation Rule Is Not a "Preference" but a Recognition of Federal Restraints on, and Obligations Towards, Native American Entities

The rule does not create a "preference" for tribal entities that is unavailable to others similarly situated. As the Commission noted in the Fifth Memorandum Opinion and Order, the Rule is based on the "unique legal constraints" that "Congress has imposed . . . on the way [tribal entities] can utilize their revenues and assets" — restraints unknown to "nearly every other corporation."[22] There are no similarly situated entities. By adopting the Tribal Affiliation Rule as part of its general affiliation regime, the Commission merely has completed a set of attribution rules that distinguishes — in an equitable and reasonable manner — entities with vastly different abilities to raise and deploy capital.

Moreover, the Tribal Affiliation Rule does not single out Native Americans above members of other groups. As the Commission specifically explained, individual Native Americans — rather than Indian Tribes or Native Corporations — will stand on the same footing as applicants composed of members of any minority group.[23] The Tribal Affiliation Rule is directed only at tribal entities, and is based not on the historic prejudices against individual Native Americans, but on the unique federal

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22. Fifth Memorandum Opinion and Order, 10 FCC Rcd at 427 (emphasis added).

23. Order on Reconsideration, 9 FCC Rcd at 4494 (this exemption does not apply to "independent entities composed of individual Native Americans").

restraints in place today on tribal entities and the use of their assets. The existence and significance of these restraints has not been and could not be challenged in these proceedings.

Indeed, only by maintaining its Tribal Affiliation Rule can the Commission ensure that applicants controlled by Indian Tribes and Native corporations will have a full and equal opportunity to participate in spectrum-based services.[24] Abolishing the Rule effectively would single out and exclude tribal Native Americans based on their unique status under federal law. Such an exclusion would violate this Commission's diversity and opportunity mandates,[25] run counter to express congressional policy and the nation's fiduciary standards in meeting its

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[24] In this context, CIRI believes that the Commission's narrowly-tailored Tribal Affiliation Rule would pass even the rigors of strict scrutiny analysis. Similarly, CIRI believes that even bidding credits and favorable payment terms accorded to Native Corporations and Indian tribes would survive that heightened review. However, CIRI accepts the Commission's proposal to eliminate all such preferences as the only practical course likely to lead to an auction in a commercially reasonable time.

[25] See 47 U.S.C.A. § 309(j)(3)(B) (West Supp. 1995) (requiring the Commission to "promote" "disseminati[on of] licenses among a wide variety of applicants, including small businesses"); 47 U.S.C.A. § 309(j)(4)(D) (West Supp. 1995) (requiring the Commission to "ensure" that "small businesses" and "businesses owned by members of minority groups and women" are given "the opportunity to participate" in spectrum based services).

"unique obligation toward the Indians,"[26] and deny Native Americans of the equal protection of the law.[27]

B. The Tribal Affiliation Rule Is an Essential Component of Federal Tribal Policy

Alaska Native Corporations were created pursuant to ANCSA as part of the political settlement of long-standing aboriginal land disputes in Alaska. Alaska Natives were "propelled into the world of corporate shareholder status. They became owners of corporations which, at the direction of Congress, hold the collective results of their settlements with the federal government."[28] Recognizing the unique relationship between the Corpo-

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[26] Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85 (1977). See United States v. Mitchell, 463 U.S. 206, 225-28 (1983) (Indians damaged by United States' breaches of special duties assumed by it per statutes and regulations enacted in furtherance of "general trust relationship between the United States and the Indian people" have right to sue government for damages).

[27] See, e.g., Craig v. Boren, 429 U.S. 190, 209 n.22 (1976) (laws that single out American Indians as a class for special adverse treatment are of "questionable constitutionality"); United States v. Antelope, 523 F.2d 400, 403-06 (9th Cir. 1975) (when Tribal Indians "are put at a serious racially-based disadvantage" by federal statute, their "rights to due process and equal protection under the Fifth Amendment require they not be treated worse than similarly situated non-Indians"), rev'd on other grounds, 430 U.S. 641 (1977) (holding that statute in question did not impose disparate burden on Tribal Indians as compared to non-Indians).

[28] Discrimination in the Telecommunications Industry: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103rd Cong., 2d Sess. 55-56 (1994) (statement of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc.) (footnote omitted) ("Brown Testimony"). Ms. Brown's testimony was filed with the Commission by Chairman Mfume on May 31, 1994 and was cited by the Commission in its Order on Reconsideration, 9 FCC Rcd at 4494 n.13.

rations and their Native American shareholders, and the severe, legally imposed, restrictions on the use of the underlying assets, Congress specifically provided in Section 29(e) of ANCSA that "[f]or all purposes of federal law," a Native Corporation shall be considered an "economically disadvantaged business enterprise."[29]

Precisely because Tribes and Native Corporations are unique and forced aggregations of persons with few individual assets and little individual income, Congress has recognized that barring these entities from governmental benefits where participation is based on assets and/or income would be contrary to federal policy. Thus, federal legislation specifically directs the Small Business Administration ("SBA") — which has primary jurisdiction over such programs — to calculate the "size" of any entities owned by an Indian tribe "without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe . . . ."[30] This express statutory "exemption reveals a clear congressional recognition . . . of the unique legal status of tribal and reservation based activities,"[31] which no federal agency is free to ignore.

Pursuant to the direction of Congress, the SBA's Rules provide that, for size determination purposes, "concerns owned

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29. 43 U.S.C.A. § 1626(e)(2) (West Supp. 1995).

30. 15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (West Supp. 1995).

31. Morton, 417 U.S. at 545-46 (emphasis added).

and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.) are not considered affiliates of such . . . tribes or Alaska Regional or Village Corporations."[32] These congressionally-mandated SBA provisions treat tribal affiliated entities as "small businesses" under a far stricter size standard than that developed by the Commission for broadband PCS. Under the SBA's rules, tribal entities are entitled to bid on government contracts otherwise open only to businesses with net worth under $6 million and net revenues under $2 million.[33] Under the Commission's rules, an entity is a "small business" for broadband PCS bidding purposes if it has revenues under $40 million.[34] It would be nonsensical if tribal entities were sufficiently "small" or "disadvantaged" to compete with $2 million companies, but too large to compete with $40 million companies. A repudiation of the SBA rules here would turn established federal policy in this area on its head.

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32. 13 C.F.R. § 121.401(b) (1995). The same exemption is included in the SBA's size standard guidelines for its 8(a) Program. 13 C.F.R. §§ 121.1102(a)(3) & 124.112(c)(2)(iii) (1995).

33. See 15 U.S.C.A. § 637(a)(1)(D)(ii) (West Supp. 1995) (granting bidding access on government contracts to small businesses); 13 C.F.R. § 121.802(a)(2)(i) (1995) (defining "small business" as one with no more than $6 million in net worth and $2 million in net income); 13 C.F.R. § 121.401(a) (1995) (aggregation of net worth and revenues for affiliated entities).

34. 47 C.F.R. § 24.720(b)(1).

In fact, the obligation to regulate in the public interest requires all federal agencies to ensure that their actions are consistent with other federal policies — particularly in areas outside an agency's field of expertise.[35] In LaRose, the D.C. Circuit found that, in "failing to recognize the constraints imposed by appellant's status" under applicable bankruptcy statutes, the Commission violated its obligation to "constantly be alert to determine whether [its] policies might conflict with other federal policies and whether such conflict can be minimized."[36]

The Commission has virtually no expertise in Native American matters and, until now, no experience with a preference program in the nature of the SBA's small business programs. Failure to "recognize the constraints imposed upon" Native Corporations and Tribes by federal law would place the Block C auction rules in direct conflict with express federal policy concerning tribal

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35. LaRose v. F.C.C.,, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974). In LaRose, the D.C. Circuit noted, "Administrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest . . . ." Id. See also Storer Communications, Inc. v. F.C.C., 763 F.2d 436, 443 (D.C. Cir. 1985) (finding Commission satisfied its "duty" to implement the Communications Act "in a manner as consistent as possible with corporate and federal securities laws" concerning shareholders' rights).

36. LaRose, 494 F.2d at 1146 n.2, 1149-50.

entities.[37] Indeed, "the Federal trust responsibility [toward Indians] imposes strict fiduciary standards on the conduct of executive agencies — unless Congress has expressly authorized a deviation from these standards in the exercise of its 'plenary power.'"[38] Congress has authorized no such departure here.

C. The Tribal Affiliation Rule Addresses the Unique Limitations Placed on Indian Tribes and Alaska Native Corporations by the Federal Government and Is Thoroughly Supported in the Record

The record before the Commission contains abundant and undisputed evidence of the unique constraints on Native Corporations and Tribes. These restraints make the Tribal Affiliation Rule particularly appropriate in light of the Commission's reasons for adopting affiliation rules in the first instance: to determine the availability of all assets and revenues that a particular applicant can bring to the bidding and building-out process. Because significant, federally imposed restraints render tribal assets largely unavailable for such purposes, tribal assets cannot fairly or appropriately be counted in assessing the "size" or "wealth" of an affiliated participant in a broadband PCS auction.

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37. The Commission has acknowledged the need to observe established federal policy in this instance. See Order on Reconsideration, 9 FCC Rcd at 4494 ("[w]e believe that adoption of an affiliation exemption for Indian tribes and Alaska Native Corporations . . . is consistent with these other Federal policies").

38. Cohen, supra, at 225.

As the record before the Commission demonstrates, Native Corporation stock — like Tribal membership — cannot be sold, pledged, or otherwise encumbered.[39] Native Corporations are barred by the operation of federal law from making board seats available to non-shareholders. Moreover, Native Corporation ownership is necessarily widely distributed among financially unsophisticated shareholders and there are no controlling blocks of shareholders to ensure stability of plan or purpose. As Congress and the Commission have found, such restrictions have the effect of "preclud[ing]" Native corporations "from two of the most important means of raising capital enjoyed by virtually every other corporation:" pledging stock against ordinary borrowings and issuing new stock or debt securities to raise capital.[40] No other private corporation — whether large or

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[39] 43 U.S.C.A. § 1606(h)(1)(B) (West Supp. 1995) provides:

> Except as otherwise provided in this subsection, Settlement Common Stock, inchoate rights thereto, and rights to dividends or distributions declared with respect thereto shall not be (i) sold; (ii) pledged; (iii) subjected to a lien or judgment execution; (iv) assigned in present or future; (v) treated as an asset under (I) Title 11 or any successor statute, (II) any other insolvency or moratorium law, or (III) other laws generally affecting creditors' rights; or (vi) otherwise alienated.

The limited exceptions to this rule are extremely onerous. See 43 U.S.C.A. § 1629c (West Supp. 1995).

[40] Fifth Memorandum Opinion and Order, 10 FCC Rcd at 427-28. See also H.R. Rep. No. 907, 93rd Cong., 2nd Sess. 2 (1974), reprinted in 1974 U.S.C.C.A.N. 2873, 2874 (Native Americans lack access to capital and to traditional sources of financing).

small, minority or non-minority owned — operates under such legal and practical restraints.

Moreover, the core and defining assets of the Native Corporations are the Alaska Natives' aboriginal lands. These lands, critical as they are, remain subject to numerous legal restraints severely limiting their utility for raising or securing capital. Most tribal lands are owned in trust by the federal government or are subject to a restraint on alienation in the government's favor. Native Corporations are subject to even more complex and burdensome restrictions. A full 70 percent of the revenue derived from the development of subsurface rights and timber resources from ANCSA land must be shared among all other Alaska Native corporations and groups of Native shareholders.[41] Thus, CIRI cannot retain the bulk of the revenues its derives from its ANCSA subsurface holdings, let alone use those revenues as an unrestricted basis for raising capital.

In addition, Native Corporation lands located within the national conservation system (e.g., National Parks or National Wildlife Refuges) are subject to severe development restrictions[42] that render the value of these assets for raising capital negligible. Federal law also restricts the use and development of the subsurface estate underlying certain Native

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41. 43 U.S.C.A. § 1606(i) (West 1986).

42. 43 U.S.C.A. § 1621(g) (West 1986).

Corporation lands.[43] Consistent with federal management of tribal reservation lands, federal law also deprives Native Corporations in many instances of administrative control over oil and gas leases and timber contracts on those lands.[44]

Harder yet to quantify, but of enormous financial impact, has been the more than twenty year delay in fulfilling the Federal statutory mandate of "prompt" delivery of Native Corporation land entitlements[45] and an ongoing history of expensive and protracted litigation over virtually every significant provision of ANCSA.[46] Indeed:

> As a result of these restraints [on alienation], as well as the common law theory that the execution of a mortgage in fact conveys an interest in the property, tribes are practically precluded from giving a mortgage on tribal land. Tribes frequently have had difficulty securing development capital in the private money market because they could not effectively mortgage their single largest asset: their land base.[47]

No commercial lender or investor can hope to find ordinary security and certainty of enforcement in this legal and regulatory miasma.

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43. 43 U.S.C.A. § 1613(f) (West 1986).

44. 43 U.S.C.A. § 1613(g) (West 1986).

45. "Fifteen years after enactment, Native corporations had received patents to less than 8% of their 40,000,000 acre land entitlement." H.R. Rep. No. 31, 100th Cong., 1st Sess. 4 (1987).

46. A 1987 Senate Report on ANCSA estimated the costs of litigation over the terms of the Act in the tens of millions of dollars. S. Rep. No. 201, 100th Cong., 1st Sess. 20 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3270.

47. Cohen, supra, at 520 (emphasis added).

Finally, Congress has deliberately imposed these restraints on the use of tribal assets in recognition that aboriginal lands form a crucial part of the Tribes' cultural heritage. They are an invaluable base for the subsistence activities of their members, carried out on these lands from time immemorial. The interests in real and personal property held by a tribe "represent a unique form of property right in the American legal system, shaped by the federal trust over tribal land and statutory restraints on alienation."[48]

More generally, Congress has imposed severe financial constraints on the ability of tribal entities to invest their assets in the public market precisely because of the quasi-sovereign status of the Tribes and Native Corporations. As the record before the Commission demonstrates, the Native Corporations have as their primary mission improving the social and economic lives of its Native shareholders.[49] The average annual family income of CIRI's shareholders is $15,000[50] and one-third live below the poverty level.[51] Statistics for the

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48. Id. at 472.

49. Cook Inlet Region Petition for Further Clarification, PP Docket No. 93-253, at 6 (filed Sep. 7, 1994).

50. Brown Testimony at 57.

51. Cook Inlet Region, Inc. Ex Parte Memorandum, PP Docket No. 93-253, at 4 (filed Oct. 26, 1994).

shareholders of the other Native Regional Corporations are similarly bleak.[52]

CIRI typically distributes more than 50 percent of its net income in cash dividends to shareholders.[53] One-third of CIRI's net income is distributed to shareholders for income maintenance. Over 70 percent of CIRI's shareholders use these payments for food, clothing, and shelter.[54] The special responsibility of these congressionally-chartered entities to pay essential dividends to their Native American shareholders has required, and is reflected in, special exemptions and legal provisions. The Alaskan Legislature, for example, was forced to amend the Alaska Corporate Code — which governs all Alaska business corporations —

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52. The median income in 1989 for all Alaska Natives was 43 percent lower than that for the State of Alaska as a whole. Id. Only 4 percent of Alaska Natives hold a bachelor's degree — a figure that is 75 percent below the state average. Id. at 56. The proportion of Alaska Native households with no husband present is double the State average. Id. See also Bureau of the Census, United States Department of Commerce, We the First Americans 15-17 (1993).

53. Petition for Further Clarification at 6. These necessary distributions to Native Corporation shareholders are inconsistent with typical, commercially-reasonable debt covenants imposed by banks, bond purchasers, and venture capital firms. Thus, the distributions further impede access to traditional borrowing sources.

54. Brown Testimony at 57-58. CIRI and the other Native Corporations also support a number of social programs, including programs to preserve Alaska Native culture, and provide health care, education and job training services to their shareholders. Brown Testimony at 57; Petition for Further Clarification at 7.

specifically to permit Native Corporations to pay dividends in circumstances in which no ordinary businesses could do so.[55]

As Congress intended in restricting the alienation of CIRI's stock and encumbering its core assets, CIRI's profits and dividends do not constitute discretionary investment income that can be put at risk to the same extent as private corporations. Consistent with its unique federally-imposed structure and responsibilities, CIRI cannot put a large proportion of its assets or revenue into its PCS investment.[56]

These unique circumstances and federal policies are reflected in the Tribal Affiliation Rule for Native Corporations and Tribal entities. Where eligibility for participation in federal programs is limited by business size, federal policy requires that the uniquely constrained assets of tribal entities are not to be included in such eligibility determinations.

D. Eliminating the Tribal Affiliation Rule Would Be Without Support in the Record

The Tribal Affiliation Rule does not single out Native Americans above members of other groups. In fact, as the Commission explained, the Rule is not available to individual Native Americans.[57] The Tribal Affiliation Rule is directed only at tribal entities and is based not on historic prejudices

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55. See Alaska Stat. § 10.06.960(g) (allowing Native Corporations to pay dividends even where there are no retained earnings and permitting net income to be calculated without regard to depletion from wasting assets).

56. Brown Testimony at 58.

57. Order on Reconsideration, 9 FCC Rcd at 4494.